

EXHIBIT 4

ecolab @msc 111507 transcript of oral arguments for sj motions

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JIMMY ENGLISH, individually and
on behalf of others similarly
situated,

Plaintiffs,

v.

06 cv. 5672 (PAC)

ECOLAB, INC.,

Defendant.

-----x

November 15, 2007
3:55 p.m.

Before:

HON. PAUL A. CROTTY

District Judge

APPEARANCES

LAW OFFICE OF DAN GETMAN
Attorneys for Plaintiffs
BY: MICHAEL J.D. SWEENEY
MATTHEW DUNN
OUTTEN & GOLDEN LLP
Attorneys for Plaintiffs
BY: JUSTIN M. SWARTZ

JACKSON LEWIS LLP
Attorneys for Defendant
BY: JEFFREY W. BRECHER
MARC S. WENGER

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(Case called)
THE DEPUTY CLERK: For the plaintiffs please state
your appearances for the record.
MR. SWEENEY: Michael Sweeney from the Getman law
office, along with Matt Dunn for the plaintiffs.
MR. SWARTZ: Justin Swartz from Outten & Golden.
MR. BRECHER: Good afternoon, your Honor. Jeffrey
Brecher, Jackson Lewis, on behalf of the defendant Ecolab.

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1 evidence that Congress did not intend to make any change to the
2 motor carrier exemption, to enforce it.

3 THE COURT: Have you looked at the Second Circuit's
4 record in the Supreme Court of the United States last term?

5 MR. BRECHER: No, Judge, I can't say I have studied
6 it.

7 THE COURT: They were reversed seven out of eight
8 times. I am very leery to rewrite an act of Congress. It says
9 commercial. You have agreed on what commercial means. Now you
10 are saying I can draw some comfort from a Second Circuit
11 decision where they rewrote a statute. They didn't rewrite
12 this statute; they rewrote another statute. Why should I do
13 that?

14 MR. BRECHER: If all I presented to you was, yes, the
15 word says commercial and that you should enforce it, yes, you
16 would enforce it as written. But what we presented to you is
17 evidence that there was no knowledge by the Department of Labor
18 prior to it. The Department of Transportation, which was
19 responsible for SAFETEA-LU, has sought to correct the change.

20 THE COURT: Mr. Brecher, the fact that they have
21 sought to correct it means the change has been made.

22 MR. BRECHER: Yes, if you interpret it literally.

23 THE COURT: If people are seeking a change from
24 Congress, why should a lowly district court here in the
25 Southern District of New York change the statute? Why

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1 shouldn't we just abide the Congressional action or inaction?

2 MR. BRECHER: I disagree with your characterization of
3 this Court.

4 THE COURT: Thank you, but you have my point.

5 MR. BRECHER: This is not the usual case. It's not
6 something that occurs very often. Here, when you have the
7 agency that was responsible for affecting the change telling
8 you it's a mistake. You have no support in the enormous
9 legislative history that a change was intended. For the courts
10 to turn a blind eye to it is not what the Second Circuit has
11 said, and I don't believe it's what the Supreme Court would say
12 either.

13 THE COURT: All right. Your best cases are the
14 Grinker case and Judge Gleeson's case in the Eastern District?

15 MR. BRECHER: Judge Gleeson, in the Southern District,
16 he said, Let me look at this statute.

17 THE COURT: In the Eastern District.

18 MR. BRECHER: In the Eastern District. Let me look at
19 this statute. If I apply the literal terms of this, you know
20 what, they are going to lose. But, he said, I can't apply this
21 literally.

22 THE COURT: I have been thinking about this, and I
23 have always been troubled by your argument on the motor carrier
24 exemption. Because it seemed to me that what happened with the
25 motor carrier exemption, it takes everybody out from under the

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1 protection of the Department of Labor and the Fair Labor
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 2 Standards Act, and what the Department of Transportation did
 3 then was it regulated the people who were driving the larger
 4 vehicles, the semitractor-trailers and the large straight
 5 trucks, but didn't regulate in any way the smaller trucks. So
 6 it left those people without the protection of any kind of
 7 protective shield which the Department of Transportation gave
 8 to drivers of bigger trucks, and that was always anomalous to
 9 me. So at least now you have a legislative scheme that says,
 10 well, the big trucks can be regulated by the Department of
 11 Transportation and the small trucks can be regulated by the
 12 Department of Labor under the Department of Labor standards.
 13 To me it makes perfect sense, even though I credit what you say
 14 that there is nothing in the legislative history about this.

15 MR. BRECHER: I think it is indisputable that it was
 16 inadvertent and the question is, what do you do about it? Do
 17 you allow an inadvertent change to overrule Second Circuit
 18 cases, hundreds of other cases throughout the country for 70
 19 years, when we all know that it was inadvertent?

20 THE COURT: All right. I have your point.

21 I don't think I need much more on this, Mr. Sweeney.

22 MR. SWEENEY: Your Honor, I rest. Thank you.

23 THE COURT: I am going to attend to this as quickly as
 24 possible. I have been holding off on the collective action
 25 motion, which was argued back in February, and I reread those

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1 papers again. What I am going to try to do as quickly as I
 2 possibly can is dispose of the collective action motion, which
 3 was briefed and argued back in February, and this motion I will
 4 do as quickly as possible.

5 Thank you for the argument. I appreciate it.

6 (Adjourned)

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